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Supreme Court of the United States

October Term, 1967

No. 802

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

ROBERT ELMER ROWE,
Respondent.

C. C. PEYTON, SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,
Petitioner,

v.

CLYDE MASON THACKER,
Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

On January 17, 1968, this Court granted a writ of certiorari to review judgments of the United States Court of Appeals for the Fourth Circuit entered on August 28, 1967, in the cases of Robert Elmer Rowe v. C. C. Peyton, Superintendent of the Virginia State Penitentiary, and Clyde Mason Thacker v. C. C. Peyton, Superintendent of the Virginia State Penitentiary.

OPINIONS BELOW

The memorandum order and opinion of the Supreme Court of Appeals of Virginia in the case of Rowe v. Peyton, decided on April 27, 1966, is not reported, but will be found in Appendix I.

The opinion of the United States District Judge for the Western District of Virginia, Harrisonburg Division, in the case of Rowe v. Peyton is not reported and will be found in Appendix II.

Clyde Mason Thacker did not pursue any remedies in the courts of the Commonwealth of Virginia, and consequently there is no State court opinion in his case.

The opinion of the United States District Court for the Eastern District of Virginia, Richmond, Division, in the case of Thacker v. Peyton is not reported and will be found in Appendix III.

The opinion of the court below (*Rowe* v. *Peyton,* 383 F. 2d 709, 4th Cir. [1967]) is found in Appendix IV.

THE JUDGMENT

On September 14, 1967, an order was entered in the United States Court of Appeals for the Fourth Circuit staying the issuance and transmission of a certified copy of the judgments of that Court in these two cases to permit the Superintendent of the Virginia State Penitentiary to seek a writ of certiorari from this Court.

JURISDICTION

The judisdiction of this court to issue the writ of certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646. 62 Stat. 967." (28 U.S.C., Section 2254)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928." (28 U.S.C., Section 1254)

QUESTION PRESENTED

Did The United States Court Of Appeals For The Fourth Circuit Err In Holding That State Prisoners May Attack In A Federal Court In A Habeas Corpus Proceeding A Sentence Which They Are Not Serving But Which Will Be Served In The Future And Which Does Not Effect The Validity Of Their Present Detention?

STATEMENT OF THE CASE

CLYDE M. THACKER

No. 11,217

Clyde Mason Thacker attacks three sentences imposed upon him on November 16, 1953, in the Circuit Court of Hanover County. Having entered a plea of guilty to each of the three charges of housebreaking, his terms were suspended by order of the Court. He was represented by counsel, who he alleges was appointed on the same day. He further alleges that he was not represented by counsel on March 19, 1956, when the suspension of each of the three sentences was revoked and he was directed to serve a term of five years imposed on each charge.

At the time the petition was filed in the District Court, Thacker was detained pursuant to a judgment of the Circuit Court of Buckingham County, Virginia, of September 17, 1964, wherein he was sentenced to serve a term of four years in the Virginia State Penitentiary, having been convicted of breaking and entering. This sentence expired on April 7, 1967, and he is presently detained pursuant to a judgment of the Corporation Court of the City of Charlottesville, Virginia, of October 9, 1964, wherein he was sentenced to serve a term of one year in the penitentiary, having been convicted of statutory burglary. When he completes the service of this and other sentences imposed by the Corporation

Court of the City of Charlottesville, he will then commence to serve sentences imposed upon him in the Circuit Courts of Greene, Albemarle, and Madison Counties. He will then serve a sentence imposed upon him as a second time offender in the Circuit Court of the City of Richmond and other sentences imposed upon him in the Circuit Courts of Henrico, Chesterfield and Powhatan Counties. Assuming that Thacker continues to earn "good time" as provided for by Virginia law, he will commence the service of the Hanover County sentences in question on November 8, 1997. The three five-year sentences which Thacker attacks do not prevent him from being eligible for parole, and if they were declared invalid, he still would not be eligible for parole, nor would his parole eligibility date be changed.

Thacker did not attack these three sentences in the courts of the Commonwealth of Virginia.

ROBERT ELMER ROWE

No. 11,072

Robert Elmer Rowe is presently detained pursuant to a judgment of the Circuit Court of Augusta County, Virginia, of June 18, 1963, wherein he was sentenced to serve a term of thirty years in the penitentiary, having been convicted of rape. This sentence will expire on September 24, 1982. He attacks the validity of a sentence imposed upon him on June 24, 1963, in the Circuit Court of the City of Waynesboro, wherein he was sentenced to serve twenty years in the penitentiary for secreting a female.

He filed a petition for a writ of habeas corpus in the Supreme Court of Appeals of Virginia, which court on April 27, 1966, dismissed the petition for the reason that Rowe was not serving the sentence of which he complained.

The voiding of the Waynesboro sentence would change his parole eligibility date to August 24, 1969.

He attacks the validity of the Waynesboro sentence on the basis that he was ineffectively represented by counsel, who told him that if he entered a plea of guilty the Waynesboro sentence would have to run concurrently with the sentence imposed upon him in the Circuit Court of Augusta County.

ARGUMENT

The Superintendent will demonstrate that the court below has ignored an established principle of law in reaching its decision in the premises. The question presented is a narrow one, upon which this Court has previously ruled, and the decision below is contrary to the same as well as contrary to the decisions of other Circuit Courts of Appeal. The United States Court of Appeals for the Fourth Circuit has therefore exceeded the jurisdiction conferred upon it in the premises, and for that reason its decision should be reversed.

I.

The Court Erred In Holding That A Federal Court May Permit A State Prisoner To Attack A Sentence By Habeas Corpus To Be Served In The Future, Said Sentence Not Affecting The Validity Of His Present Detention.

It is manifest from a reading of each of the petitions filed that the same state a prima facie case and that the prisoners would be entitled to a plenary hearing if they were serving the sentences of which they complained. This is true under both State and Federal decisions. *Whitley* v. *Cunningham,* 205 Va. 251, 131 S.E. 2d 823 (1964); *Burley* v. *Peyton,* 206 Va. 546, 145 S.E. 2d 175 (1965); *Jones* v. *Cunningham,* 297 F. 2d 851 (4th Cir. 1962).

The Superintendent does not raise any question of exhaustion in this proceeding.

In *McNally* v. *Hill,* 293 U.S. 131 (1934) this Court held that the writ lies only to attack the validity of a prisoner's present detention. The United States Court of Appeals for the Fourth Circuit declined to follow this Court's decision in the cited case in considering the two cases now before this Court.

Other Circuit Courts of Appeal have had occasion to consider this question and have followed the rule of stare decisis and this Court's decision in *McNally.* The Ninth Circuit Court of Appeals in *Arketa* v. *Wilson,* 373 F. 2d 582 (9th Cir., 1967) and *Collins* v. *Clinger,* 353 F. 2d 731 (9th Cir., 1965) followed *McNally,* declining to follow the Fourth Circuit's decision in *Martin* v. *Virginia,* 349 F. 2d 781.

Likewise, the Tenth Circuit has recently refused to consider the validity of a sentence to be served in the future. *Vialpando* v. *Patterson,* 382 F. 2d 588 (10th Cir., 1967); *Roberts* v. *Croust,* 350 F. 2d 299 (10th Cir., 1965).

The Sixth Circuit Court of Appeals in *McIntosh* v. *Steele,* 184 F. 2d 721 (8th Cir., 1950), has continued to follow this Court's decision in *McNally.*

The Seventh Circuit Court of Appeals in *United States ex rel. Devoney* v. *Pate,* 359 F. 2d 829 (7th Cir., 1966) has continued to follow *McNally.* See also *Welsh* v. *Markly,* 338 F. 2d 561 (7th Cir., 1964) and *Postelwait* v. *Markly,* 342 F. 2d 677 (7th Cir., 1965).

The United States Court of Appeals for the Sixth Circuit has also continued to follow this Court's decision in *McNally. Lowther* v. *Maxwell,* 347 F. 2d 941 (6th Cir., 1965).

In *Brown* v. *Beto,* 377 F. 2d 950 (5th Cir., 1967), the Fifth Circuit Court of Appeals carefully examines the decisions of other circuits on this question and adheres to the *McNally* rule.

In a short per curiam opinion the Third Circuit Court of Appeals in *Gailes* v. *Yeager,* 324 F. 2d 630 (3rd Cir., 1963), adheres to the *McNally* rule.

Likewise, the District of Columbia Circuit Court of Appeals has felt that it is bound by the *McNally* rule. *Moon* v. *United States,* 272 F. 2d 530 (D. C. Cir., 1959).

As hereinbefore pointed out, the Court below held that both of these State prisoners could attack in a Federal Court in a habeas corpus proceeding a sentence which they are not now serving but which will be served in the future and which sentence does not affect the validity of their present detention. This Court in *McNally* v. *Hill,* 293 U.S. 131 (1934) held that the writ of habeas corpus in a federal court lies only to attack the validity of the prisoner's present detention, while the Court in *Jones* v. *Cunningham,* 371 U.S. 236 (1963) extended the rights under the writ. The decision was predicated upon the fact that the prisoner was still in custody in that he was restrained of his liberty by the Virginia Parole Board. The Court below points to no decision of this Court which overrules *McNally.*

The principles of *McNally* were reaffirmed by this Court in *Holiday* v. *Johnston,* 313 U.S. 342, 349 (1941). Likewise, in *Heflin* v. *United States,* 358 U.S. 415 (1959), this Court affirmed its belief in the *McNally* doctrine.

In *Fay* v. *Noia,* 372 U.S. 391, 432 (1962), this Court said:

> "Surely this state interest in an airtight system of forfeitures is of a different order from that, vindicated in Murdock, in the autonomy of state law within the

> proper sphere of its substantive regulation. The difference is illustrated in the settled principle that if a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count on federal habeas. McNally v. Hill, 293 US 131, 79 L ed 238, 55 S Ct 24. For the federal court to order the release of such a prisoner would be to nullify a proceeding—that under the first count—wholly outside the orbit of federal interest. Contrariwise, the only count under which Noia was convicted and imprisoned is admitted to be vitiated by force of federal law."

In view of the foregoing, it is manifest that this Court has consistently adhered to the *McNally* doctrine and that a prisoner may attack only the validity of a sentence he is presently serving.

It is clear that the United States Court of Appeals for the Fourth Circuit has previously dealt with several fictions in the law in connection with its decisions in *Williams* v. *Peyton,* 372 F. 2d 216 (4th Cir. 1967) and *Martin* v. *Virginia,* 349 F. 2d 781 (4th Cir. 1965), permitting state prisoners to attack sentences to be served in the future in federal courts. These cases were premised upon the fact that the prisoners would become eligible for parole by voiding a sentence to be served in the future. In the cases now before this Court, neither of these two holdings are applicable herein.

It is manifest that should the decision of the Court below be followed it would inure to the benefit of the Commonwealth and to the prisoner. A speedy adjudication of the prisoner's claims before the witnesses die and memories grow dim is certainly to the advantage of the people of our Commonwealth. This question was presented to the Virginia Advisory Legislative Council, which has been study-

ing habeas corpus in the courts of the Commonwealth. The report, which was released just prior to the decision of the Court below but subsequent to the argument of these cases, recommends in part:

> "Prisoners should be permitted to file habeas corpus petitions, not only to challenge the legality of detention under a sentence currently being served but also to challenge on the basis of a sentence which has been suspended or is to be served following the current sentence. The Virginia Advisory Legislative Council recommends that § 8-596 of the Code of Virginia be amended to provide in part: 'Such petition may allege detention without lawful authority to challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by the petitioner.'"

This report has been made to the Governor of the Commonwealth of Virginia, and appropriate legislation was introduced in January of 1968 to carry out this recommendation. At the time this brief is being written, the same has not yet been acted upon by the General Assembly of Virginia, but the Court will be advised prior to the argument of this case what action, if any, has been taken by the Virginia Legislature.

In Virginia the problem has been approached in the appropriate and proper manner. The Legislature has been asked to amend the applicable provisions of law to permit prisoners to attack sentences to be served in the future. It is appropriate that this procedure be followed and that the statute not be amended by judicial decree. Indeed, the Supreme Court of Appeals of Virginia has refused to do just this. It is far better to permit the prisoner to attack a sen-

tence to be served in the future as soon as possible after the conviction rather than to require him to wait many years, at which time he may be the only witness alive to testify as to what purportedly occurred. We, therefore, agree with the spirit of the decision of the Court below but not with the approach of amendment by judicial decree. It would be far better and proper for Congress to amend the statute permitting prisoners to attack sentences to be served in the future.

As hereinbefore pointed out, the issue before the Court is very narrow. The sole question is whether or not this Court will by judicial decree amend § 2254 of Title 28 U.S.C. to provide that state prisoners may attack in a federal court sentences to be served in the future. It is the position of the superintendent that this Court should not engage in such judicial legislation.

CONCLUSION

For the reasons stated, it is submitted that the judgments of the Court below should be reversed and that the decisions of the District Courts should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Reno S. Harp, III, an Assistant Attorney General of Virginia, counsel for the Superintendent in the captioned matter, and a member of the bar of the Supreme Court of the United States, do hereby certify that on this 1st day of February, 1968, I mailed a copy of the foregoing Brief by by first class mail to Mr. John J. Kirby, Jr., 4201 S. 31st Street, Apartment 808, Arlington, Virginia, and Mr. Thomas S. Currier, University of Virginia, School of Law, Charlottesville, Virginia, counsel for the respondents herein.

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